# Sivanesvaran a/l Balakrishnan v Ketua Polis Negara, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–8 OF 2005
LIM YEE LAN JC
19 JANUARY 2006

*Administrative Law — Remedies — Habeas corpus — Applicant ordered to be detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Order of Minster — Whether order of detention of Minister open to judicial review — Whether there was non-compliance with any procedural requirement governing the detention*

This was an application for a writ of habeas corpus by the applicant who was ordered to be detained by the Deputy Minister of Home Affairs ('Deputy Minister') pursuant to a detention order dated 21 December 2004 under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') in relation to his criminal activities. With the amendment to the Ordinance by the insertion of ss 7C and 7D, the act of the Deputy Minister in making a detention order under the Ordinance cannot be the subject of a judicial review by the court saves in regard to any question of non-compliance with any procedural requirement governing the detention provided in the Ordinance.

**Held**, allowing the application:

(1) Form I and Form II from the Advisory Board to the applicant were defective in that the person who had purportedly translated the contents of the two forms to the applicant into Tamil was a Malay and on the face of it, there was no affidavit sworn by this person as regards to his qualification or proficiency or fluency of the Tamil language and/or that he had properly translated the contents of the two forms to the applicant and that the applicant had truly understood the nature of his right to make representation against his detention as provided in s 5(1) of the Ordinance and arts 5(3) and 151 of the Federal Constitution (see para 6).

(2) There was nothing to indicate the language which was used in the proceedings before the Advisory Board as the applicant had requested in Form 1 to speak in is the Tamil loghat and it was not known who had translated the proceedings in his representation before the Advisory Board. This raised a doubt as to whether the applicant had been given a full and meaningful representation before the Advisory Board (see para 6).

(3) Section 4 of the Ordinance provides, inter alia, that a detention order shall provide for the detention of a person for any period not exceeding two years.

In the detention order issued by the Deputy Minister for the detention of the applicant it was specified that he shall be detained for two years with effect from 21 December 2004 at the Pusat Pemulihan Akhlak, Simpang Rengam, Johor. However, there was nothing on record to show when the applicant was sent to the said centre. This failure to disclose a vital fact has put into jeopardy the actual period of detention of the applicant, that is, when exactly did his detention start and when would it expire. The court is not at liberty to assume that based on an arithmetic calculation the applicant should be released on the expiry of two years from 21 December 2004. This put into doubt whether the intention of the Deputy Minister had or could have been implemented (see paras 8, 10).

**[Bahasa Malaysia summary**

Ini adalah satu permohonan untuk writ habeas corpus oleh pemohon yang telah diperintahkan untuk ditahan oleh Timbalan Menteri Hal Ehwal Dalam Negeri ('Timbalan Menteri') menurut satu perintah penahanan bertarikh 21 Disember 2004 di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan tersebut') berkaitan kegiatan jenayahnya. Sehubungan dengan pindaan kepada Ordinan tersebut dengan kemasukan ss 7C dan 7D, tindakan Timbalan Menteri dalam membuat perintah penahanan di bawah Ordinan tersebut tidak boleh tertakluk kepada kajian semula kehakiman oleh mahkamah kecuali berkaitan apa-apa persoalan berhubung ketidakpatuhan dengan apa-apa keperluan prosedural yang mengawal penahanan tersebut yang diperuntukkan dalam Ordinan tersebut.

**Diputuskan**, membenarkan permohonan:

(1) Borang I dan Borang II daripada Lembagan Penasihat kepada pemohon adalah defektif di mana seseorang yang dikatakan telah menterjemahkan kandungan kedua-dua borang kepada pemohon ke bahawa Tamil adalah seorang berbangsa Melayu dan berdasarkan itu, tiada afidavit diangkat sumpah olehnya berkaitan kelayakan atau kemahirannya dalam bahasa Tamil dan/atau beliau telah menterjemah dengan betul kandungan kedua-dua borang kepada pemohon dan bahawa pemohon benar-benar memahami sifat hak beliau untuk membuat representasi terhadap penahanannya seperti yang diperuntukkan dalam s 5(1) Ordinan tersebut dan perkara-perkara 5(3) dan 151 Perlembagaan Persekutuan (lihat perenggan 6).

(2) Tiada apa-apa untuk memaklumkan bahasa yang akan digunakan dalam prosiding di hadapan Lembaga Penasihat kerana pemohon telah memohon dalam Borang I untuk berbicara dalam loghat Tamil dan tidak diketahui siapa yang menterjemah prosiding dalam representasinya di hadapan Lembaga Penasihat. Ini telah menimbulkan keraguan berhubung sama ada pemohon telah diberikan representasi penuh dan bermakna di hadapan Lembaga Penasihat (lihat perenggan 6).

(3) Seksyen 4 Ordinan tersebut memperuntukkan, antara lain, bahawa satu perintah penahanan hendaklah memperuntukkan penahanan seseorang untuk

apa-apa tempoh tidak lebih daripada dua tahun. Dalam perintah penahanan yang dikeluarkan oleh Timbalan Menteri untuk penahanan pemohon, ia telah ditetapkan bahawa beliau akan ditahan selama dua tahun bermula daripada 21 Disember 2004 di Pusat Pemulihan Akhlak, Simpang Rengam, Johor. Namun, tiada apa-apa atas rekod yang menunjukkan bahawa pemohon telah dihantar ke pusat tersebut. Kegagalan ini menunjukkan fakta penting yang menjejaskan tempoh sebenar penahanan pemohon, iaitu, bila sebenarnya penahanan beliau bermula dan bila ia akan berakhir, Mahkamah tidak bebas untuk menganggap bahawa berdasarkan pengiraan aritmetik pemohon patut dibebaskan selepas tamat dua tahun daripada 21 Disember 2004. Ini menimbulkan keraguan sama ada niat Timbalan Menteri telah atau boleh dilaksanakan (lihat perenggah 8, 10).]

**Notes**

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 580–634.

**Legislation referred to**

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4(1), 5(1)
Federal Constitution arts 5(3), 151

*M Manoharan (M Manoharan) for the applicant.*
*Mohd Asnawi bin Abu Hanipah (Federal Counsel) for the respondents.*

**Lim Yee Lan JC:**

**[1]** This is an application for a writ of habeas corpus by the applicant who was ordered to be detained by the Deputy Minister of Home Affairs ('Deputy Minister') pursuant to a detention order dated 21 December 2004 pursuant to s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') inrelation to his criminal activities.

**[2]** There were five main grounds of application in his notice of motion which was supported by his affidavit in support of his application.

**[3]** The application was opposed by the three respondents which had filed six affidavits by various persons in reply to the allegations raised by the applicant in his application.

**[4]** As rightly pointed out by the learned counsel for the applicant, with the amendment to the Ordinance by the insertion of ss 7C and 7D, the act of the Deputy Minister in making a detention order under the Ordinance cannot be the subject of a judicial review by the court save in regard to any question of non-compliance with any procedural requirement governing the detention provided in the Ordinance.

A **[5]** In this case, having considered the affidavits and the relevant exhibits filed there in on behalf of the applicant and the respondents and having heard the submissions of the learned counsel for the applicant and the learned federal counsel for the respondents, I find that there are merits in two of the grounds raised by the applicant relating to procedural non-compliance as regards to his detention under the B Ordinance.

**[6]** The first procedural non-compliance relates to ground (c) in the applicant's notice of motion which was elaborated in para 12 of his affidavit. I am in agreement with the learned counsel for the applicant that Form I (representation of the C applicant to the Advisory Board against his detention) (exh 'KA-1' of encl 13) and Form II (notice of hearing of representation) from the Advisory Board to the applicant (exh 'KA-2' of encl 13) were defective in that the person by the name of Harun Musa who had purportedly translated the contents of the two forms to the applicant into Tamil was a Malay and on the face of it there was no affidavit sworn by this person as regards to his qualification or proficiency or fluency of the said D Tamil Language and or that he had properly translated the contents of the two forms to the applicant and that the applicant truly understood the nature of his right to make representation against his detention as provided in s 5(1) of the Ordinance and arts 5(3) and 151 of the Federal Constitution. Indeed if one were to look at Form I, the part relating to whether the applicant proposed to be represented or not to be E represented by a legal practitioner was not deleted and this raises a doubt as to whether contents of that Form were fully explained to the applicant and the applicant was indeed informed that he had the right to consult and be defended by a legal practitioner of his choice as guaranteed to him under art 5(3) of the Federal Constitution. In addition, in the affidavit filed by the Secretary to the Advisory Board in encl 13, there was nothing to indicate the language which was used in the F proceedings before the Advisory Board as the applicant had requested in Form I to speak in the Tamil loghat and it was not known who had translated the proceedings in his representation before the Advisory Board. This also raises a doubt as to whether the applicant had been given a full and meaningful representation before the Board.

G **[7]** The second ground of procedural non-compliance was with regard to the actual period of detention of the applicant as specified in the detention order as raised in ground (d) of his notice of motion and elaborated in para 13 of the applicant's supporting affidavit. Section 4 of the Ordinance provides, inter alia, that a detention order shall provide for the detention of a person for any period not exceeding two H years.

**[8]** In the detention order dated 21 December 2004 issued by the Deputy Minister for the detention of the applicant it was specified that he shall be detained for two years with effect from 21 December 2004 at the Pusat Pemulihan Akhlak, Simpang Rengam, Johor. However, there was nothing on record to show when the applicant I was sent to the said centre.

**[9]** The learned federal counsel for the respondents admitted that the applicant was still in police custody up to 6pm on 21 December 2004 but he submitted that the applicant could still have been sent to the Pusat Pemulihan Akhlak, Simpang

Renggam that night itself or the next morning. Although the learned federal counsel did not specifically refer to it but I believe he had in mind s 4C of the Ordinance which, inter alia, allows the period of journey to the place of detention to be done within the period covered in the detention order.

**[10]** However, this argument is only good if there are facts on record to show when the applicant was actually sent to the Pusat Pemulihan Akhlak at Simpang Renggam, Johor. No affidavit was filed by the Penguasa Pusat Pemulihan Akhlak of Simpang Renggam as to the date the applicant was actually received by the centre or if at all he was sent to the said centre. This failure to disclose a vital fact has put into jeopardy the actual period of detention of the applicant, that is, when exactly did his detention start and when would it expire? This court is not at liberty to assume, as suggested by the learned federal counsel, that based on an arithmetic calculation, he should be released on the expiry of two years from 21 December 2004. This put into doubt whether the intention of the Deputy Minister had or could have been implemented.

**[11]** Based on the foregoing reasons, this court will grant the application of the applicant and issue a writ of habeas corpus for his release and it is so ordered that the applicant be brought before this court and be released forthwith.

*Application allowed.*

Reported by Peter Ling